Supreme Court, U.S.
FILED
941667 APR 11 1995
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CADLE COMPANY

v.

THE ESTATE OF FORREST WEAVER

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the four-year statute of limitation generally applicable to contracts under Texas law bars suit on a promissory note purchased from the Federal Deposit Insurance Corporation when that lawsuit was timely filed under the six-year statute of limitation set out in the Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA").

Alternatively, whether the extended statute of limitation set out in FIRREA governs all actions on promissory notes acquired from the FDIC by private parties notwithstanding any provision of any contract.

Alternatively, whether the right of an assignee of the FDIC to use the FIRREA statute of limitation can be restricted by contract.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CADLE COMPANY,

Petitioner,

v.

THE ESTATE OF FORREST WEAVER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Cadle Company petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas ("Fifth District Court of Appeals").

OPINIONS BELOW

The opinion of the Fifth District Court of Appeals is unreported, although a Motion to Publish has been filed by a non-party to this action. (App. A, *infra*, 1a-9a)

JURISDICTION

The Fifth District Court of Appeals entered its judgment in this matter on July 30, 1994, and overruled Petitioner's motion for rehearing on August 15, 1994. (App. B, *infra*, 10a) The Texas Supreme Court denied Petitioner's application for writ of error on December 8, 1994, with the notation "writ denied."[1] (App. C, *infra*, 11a-12a). Petitioner's motion for rehearing of that application was overruled by the Texas Supreme Court on January 12, 1995. (App. D, *infra*, 13a-14a) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a). Pursuant to Supreme Court Rule 29.1, Petitioner has no parent or subsidiary companies.

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[1] "Writ denied" indicates that the Texas Supreme Court is not satisfied that the opinion of the Court of Appeals in all respects has declared the law correctly, but is of the opinion that the application presents no error of law that requires reversal or is of such importance to the jurisprudence of the *state* as to require correction. Tex. R. Sup. Ct. 133; 733 S.W.2d cxviii (1987) (eff. January 1, 1988).

STATUTORY PROVISIONS INVOLVED

Section 1821(d)(14) of the federal Banking Code, 12 U.S.C. § 1821(d)(14), and section 16.004 of the Texas Civil Practice and Remedies Code are set out in the Appendix. (Apps. E & F, *infra*, 15a-17a)

STATEMENT

This case concerns whether Petitioner timely filed suit on two promissory notes Petitioner purchased from the Federal Deposit Insurance Corporation ("FDIC"). Petitioner contends that ***all*** assignees of the FDIC are entitled to the six-year FIRREA statute of limitation *by operation of law* and that this lawsuit was timely filed within that limitation period. The Fifth District Court of Appeals, however, held that pursuant to the Loan Sale Agreement Petitioner received only a limited assignment from the FDIC, which assignment did *not* include the right to rely on the extended FIRREA limitation period.[2] (App. A, *infra*, at 9a) Consequently, Petitioner's claims were barred under Texas's four-year statute of limitation.[3] *Id.*

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[2] Petitioner contends that the Court of Appeals misinterpreted the Loan Sale Agreement between the FDIC and Petitioner and ignored the operative transfer document, the Bill of Sale, in reaching this conclusion.

[3] Contract actions are governed by a four-year limitation period under Texas law. *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1365 (5th Cir. 1994). In its opinion, the Court of Appeals incorrectly cited Tex. Civ. Prac. & Rem. Code Ann. § 16.003, the two-year statute of limitation applicable to tort claims in Texas.

With its holding in this case, the Court of Appeals effectively concluded that the Loan Sale Agreement between Petitioner and the FDIC preempted the statute of limitation set out in FIRREA, as well as the decisions of the United States Court of Appeals for the Fifth Circuit and the Texas Supreme Court regarding that limitation provision.

1. Congress enacted FIRREA in response to the nationwide banking crisis of the 1980s,[4] and included in that statute a special statute of limitation applicable to contract claims brought by the FDIC as receiver or conservator of a failed bank.[5] That limitation provision gives the FDIC, as receiver of a failed bank, *no less* than six years from the date the claim accrues in which to file suit on any contract claim of the failed bank — notwithstanding ***any*** provision of ***any*** contract. 12 U.S.C. § 1821(d)(14)(A). FIRREA specifically provides:

> ***Notwithstanding any provision of any contract***, the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be —

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[4] "Congress noted that one of the main purposes of the Act was to 'establish organizations and procedures . . . to resolve failed thrift cases and dispose of the assets of these institutions.'" *FDIC v. Updike Bros., Inc.*, 814 F. Supp. 1035, 1043 (D. Wyo. 1993) (quoting H.R. Rep. No. 101-43(I), 101st Cong., 1st Sess. 1, 307, *reprinted in* 1989 U.S. Code Cong. & Admin. News 89, 103).

[5] This statute of limitation is codified at 12 U.S.C. § 1821(d)(14).

(i) in the case of any contract claim, the longer of —

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law... .

12 U.S.C. § 1821(d)(14) (emphasis added). If the otherwise-applicable state statute of limitation provides a longer limitation period, then the FDIC is entitled to that longer period. *Id.* In either event, once the FDIC has been appointed receiver or conservator, contract claims of the failed bank accrue on the later of the date of the FDIC's appointment or the date on which the cause of action would have otherwise accrued under the relevant state's law. 12 U.S.C. § 1821(d)(14)(B).

2. Although FIRREA is silent as to assignees of the FDIC, virtually every court that has considered the issue has held that a private party obtains the benefit of the six-year FIRREA limitation period (or its predecessor 28 U.S.C. § 2415(a)) *by operation of law* when that party buys a promissory note from the FDIC as receiver or conservator of a failed bank. *See Investment Co. of the Southwest v. Reese*, 875 P.2d 1086, 1089-90 (N.M. 1994) (collecting cases).[6] In *FDIC v.*

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[6] Ironically, the New Mexico Supreme Court's opinion in *Investment Co. of the Southwest* highlights the Fifth District Court of Appeals' apparent reluctance to follow the rest of the nation's courts on the FIRREA limitation issue and cites this case, as it stood before the Texas Supreme Court's reversal, as one of then only four aberrations in the case law. *Id.* at 1090 n.7.

Bledsoe, which is the leading opinion in this area, the United States Court of Appeals for the Fifth Circuit held that:

> [A]ssignees of the FDIC and the FSLIC are entitled to the same six year period of limitations as the FDIC and the FSLIC. Transferring the federal six year statute of limitations from the FDIC and FSLIC to its assignees is consistent with the common law of assignments, furthers Congressional policy, and is supported by the cases extending the *D'Oench, Duhme* doctrine to private assignees.

989 F.2d 805, 811 (5th Cir. 1993).[7] Similarly, the Texas Supreme Court held that "section 1821(d)(14) applies to actions brought by purchasers of assets from the FDIC to recover on those purchased assets." *Jackson v. Thweatt*, 883 S.W.2d 171, 178 (Tex. 1994); *The Cadle Co. v. Weaver*, 883 S.W.2d 179, 179 (Tex. 1994) (per curiam) (assignees of promissory notes from FDIC receive benefit of the extended limitation period applicable to the FDIC). Neither the Fifth Circuit

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[7] *Bledsoe* involved the applicability of 28 U.S.C. § 2415(a). Nevertheless, the Fifth Circuit discussed both that provision and the FIRREA limitation period and reached the same conclusion regarding both statutes. Consequently, *Bledsoe* has been cited or relied upon by virtually every court considering the applicability of the six-year FIRREA limitation period to assignees of the FDIC.

nor the Texas Supreme Court held or indicated that an assignee's right to rely on the FIRREA limitation period was or could be restricted by contract. Consequently, the Fifth District Court of Appeals' decision in this case represents a significant departure from established precedent and directly conflicts with the Fifth Circuit's opinion in *Bledsoe* and the Texas Supreme Court's broad holding in *Jackson*.

3. a. On approximately February 2, 1984, Forrest Weaver executed a promissory note in the original principal amount of $52,156.54 made payable to the First National Bank of Irving, Texas ("FNB-Irving"). (Tr. 8, 13)[8] On approximately February 21, 1986, Mr. Weaver executed a second promissory note in the original principal amount of $17,841.55 made payable to FNB-Irving. (Tr. 7-8, 13) The first note matured according to its terms on February 2, 1987, and the second note matured according to its terms on May 22, 1986. (Tr. 10) Certain payments were made on both notes, but neither was paid in full. (Tr. 38) These notes are referred to collectively as the "Weaver Notes."

b. On April 24, 1986, the Office of the Comptroller of the Currency of the United States appointed the FDIC as receiver of FNB-Irving. (Tr. 111) At that moment the Texas statute of limitation, previously applicable to the Weaver Notes, was displaced by the six-year FIRREA statute of limitation. As a result, the FDIC had until at least April 25, 1992, to file suit on the Weaver Notes. On November 12, 1986, the

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[8] "Tr." refers to the transcript in the Court of Appeals.

FDIC made demand on Mr. Weaver for full payment of both notes. (Tr. 145, 178) On February 28, 1990, Petitioner purchased the Weaver Notes from the FDIC as part of a bulk sale.[9] (Tr. 113-114).

c. On January 8, 1991, well within the six-year FIRREA limitation period, Petitioner filed suit against Mr. Weaver in the 14th Judicial District Court of Dallas County, Texas to collect the sums due under the Weaver Notes.[10] (Tr. 7-12) Respondent substituted as defendant in this action upon Mr. Weaver's death. (Tr. 33-34) Both parties filed motions for summary judgment. (Tr. 73-90; 132-36) Petitioner's motion sought to recover the amounts due under the Weaver Notes, while Respondent's motion sought a take-nothing judgment on the ground that Petitioner's claims were barred by the four-year Texas statute of limitation. (Tr. 73-90; 132-36) Petitioner opposed Respondent's motion because this action was timely filed under the six-year FIRREA statute of limitation applicable to assignees of the FDIC.[11] (Tr. 209, 79-84)

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[9] The relevant excerpt from the Loan Sale Agreement is quoted below at page 10, while the relevant excerpt from the Bill of Sale is set out at Appendix G, *infra*, 18a.

[10] On April 9, 1991, this case was transferred to the 191st Judicial District Court of Dallas County, Texas.

[11] Attached to Petitioner's motion and response were copies of the decision in *Mountain States Fin. Resource Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991), and the decision in *The Cadle Company v. Bryant*, No. 12,447 (Ch. Ct. Franklin Co., Tenn. 1990), two of the earliest decisions addressing the availability of the extended federal limitation period to assignees of the FDIC. (Tr. 91-100).

d. On June 5, 1992, the trial court entered a final judgment against Petitioner holding that Petitioner's claims were barred by the four-year Texas statute of limitation and that Petitioner was not entitled to the six-year FIRREA limitation period. (Tr. 227-28) On March 25, 1993, the Fifth District Court of Appeals affirmed the judgment of the trial court holding that Petitioner's claims were barred by Texas's four-year statute of limitation. Judgment was rendered on Petitioner's application for writ of error by the Texas Supreme Court on March 9, 1994, reversing the judgment of the Court of Appeals per curiam. (App. H, *infra*, 19a-21a) In its opinion, the Texas Supreme Court held that "an assignee of a promissory note from the FDIC does receive the benefit of the extended limitations period applicable to the FDIC." *The Cadle Co. v. Weaver*, 883 S.W.2d 179, 179 (Tex. 1994). (App. H, *infra*, 19a-21a) The case was then remanded to the Court of Appeals for further proceedings in conformity with the Supreme Court's opinion. (App. I, *infra*, 22a-23a)

e. On remand, the Court of Appeals again affirmed the trial court's judgment in favor of Respondent, this time on the ground that Petitioner did not *purchase* from the FDIC the right to rely on the six-year FIRREA limitation period. (App. A, *infra*, at 9a) The Court of Appeals drew this conclusion from the language of paragraph 2.12 of the Loan Sale Agreement, which addresses Petitioner's *use* of certain *special defenses* of the FDIC:

> FDIC Defenses. Buyer acknowledges that it does not have the right to, and further warrants, represents and agrees that it will not in any event *raise* or *pursue* any special legal argument or position available to the FDIC as a result of its activities as liquidator or receiver of failed banks, whether such argument or position is based on statute such as 12 U.S.C. Section 1823(e), or case law, such as *D'Oench Duhme and Co. v. FDIC*, 31 U.S. 447 (1942) and its related line of cases. Buyer acknowledges that there is no adequate remedy at law for violation of this provision and consents to the entry of an order by a court of competent jurisdiction enjoining any violation or threatened violation of this provision.

(Tr. 141, emphasis added) The Court of Appeals did not explain how this purported restriction on Petitioner's *use* of the FDIC's "special defenses" meant that the FDIC did not convey and the Petitioner did not purchase the FDIC's right to rely on the FIRREA limitation period.[12] Moreover, the Court of Appeals did not explain why the FDIC's

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[12] Nor did the Court of Appeals reconcile its conclusion, drawn from paragraph 2.12 of the Loan Sale Agreement, with the language in the Bill of Sale — the operative transfer document — providing that the FDIC "does hereby sell, assign and convey to Buyer . . . all right, title and interest of Seller in and to those certain promissory notes" described in the Bill of Sale. (App. G, *infra*, 18a)

right to an extended limitation period constituted a "special defense" of the FDIC.[13] Finally, and most importantly, the Court of Appeals failed to explain how paragraph 2.12 of the Loan Sale Agreement — whatever it might say — preempted the Fifth Circuit's opinion that FIRREA *itself* entitles assignees of the FDIC to rely on the six-year statute of limitation contained in that statute. *See Bledsoe*, 989 F.2d at 811.

REASONS FOR GRANTING PETITION

The proposition adopted by the Fifth District Court of Appeals, and left standing by the Texas Supreme Court, creates a conflict among the states and within the Fifth Circuit on an issue of vital importance to the federal banking system — maintaining the ability of the FDIC to insure the deposits of millions of Americans. In particular, the Fifth District Court of Appeals' holding that Petitioner received from the FDIC a *limited assignment* that did *not* include the right to rely on the extended FIRREA limitation period conflicts with the numerous decisions holding that assignees of the FDIC are entitled to that limitation period *by operation of law*. *See, e.g., FDIC v. Bledsoe*, 989 F.2d 805, 809-10 (5th Cir. 1993); *Fall v. Keasler*, 1991 U.S. Dist. LEXIS 18771, *9 (N.D. Cal. Dec.

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[13] As the First District Court of Appeals in Houston noted, "unlike most statutes of limitation, section 1821(d)(14)(A), applicable in particular to FDIC dispositions, creates a *right* for the FDIC rather than a shield of defense for defendant." *The Cadle Co. v. Matheson*, 870 S.W.2d 548, 550 (Tex. App.— Houston [1st Dist.] 1994, writ denied) (emphasis added).

18, 1991) (App. J, *infra*, 24a-34a); *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086, 1089-90 (N.M. 1994) (collecting cases); *The Cadle Co. II, Inc. v. Stamm*, 633 So.2d 45, 47 (Fla. Dist. Ct. App. 1994) (collecting cases). By denying Petitioner the right to rely on the FIRREA limitation period because of its interpretation of paragraph 2.12 of the Loan Sale Agreement, the Court of Appeals' decision also conflicts with the express language of section 1821(d)(14), which defines the applicable limitation period — "notwithstanding any provision of any contract." The profound uncertainty in the law created by these conflicts directly decreases the marketability of assets owned by the FDIC and jeopardizes the FDIC's ability to maintain the federal depository insurance funds on the sound financial footing envisioned by Congress when enacting FIRREA. Due to its magnitude, this important federal issue cries out for this Court's guidance.

One of the FDIC's primary duties is to pay depositors of failed financial institutions. 12 U.S.C. § 1821(a)(1); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 380 (5th Cir. 1990); *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982). In so doing, the FDIC helps ensure the viability of America's banking system and the public's confidence in that system.[14] Moreover, the FDIC is specifically charged by statute to maximize

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[14] The public's plummeting confidence in the nation's banking system was one of the driving forces behind FIRREA. *See Updike Bros., Inc.* 814 F.Supp. at 1038, (quoting H.R. Rep. No. 101-43 (I), 101st Cong., 1st Sess. 1, 305, *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 101).

its net returns and minimize its losses. *Updike Bros., Inc.*, 814 F. Supp. at 1041. The FDIC is thus accountable both to individual depositors and to the tax-paying public, which ultimately pays for the FDIC's losses. *FDIC v. Fedders Air Conditioning USA, Inc.*, 821 F. Supp 50, 53 (D. Mass. 1993), *aff'd in part, rev'd in part*, 35 F.3d 18 (1st Cir. 1994); *Updike Bros., Inc.*, 814 F. Supp. at 1041-42.

When appointed receiver of a failed depository institution, the FDIC has two methods by which to meet its insurance obligations to the depositors of that institution. First, it may liquidate the assets of the failed bank, pay off its depositors with the proceeds, and cover any shortfall with insurance funds. *Gunter*, 674 F.2d at 865. Second, the FDIC may sell the assets of the failed bank to a solvent bank through a purchase-and-assumption transaction. In such a transaction, the solvent bank also assumes the failed bank's liabilities.[15] *Id.* Both methods are aimed at maximizing the recovery of assets of failed banks.

Purchase-and-assumption transactions are the preferred method because they minimize the FDIC's losses, expand the purchasing institution's opportunities at low risk, and protect depositors. *Porras*, 903 F.2d at 381; *FDIC v. Wood*, 758 F.2d 156, 160-61 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985). Because of the rapidity with which purchase-and-assumption transactions must occur, the acquiring bank is entitled to return substandard assets to the FDIC. *Gunter*, 674 F.2d

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[15] In some instances, the FDIC will create a bridge bank to operate the failed bank until a purchase-and-assumption transaction can be completed. *See* 12 U.S.C. § 1821(n).

at 865. As a result, the liabilities assumed by the new bank exceed the assets acquired. *Id.* To remedy this imbalance, the FDIC in its corporate capacity draws upon the federal depository-insurance funds to buy the returned assets from the FDIC in its receivership capacity, which in turn transfers the FDIC payments to the purchasing bank. *Id.* The FDIC then attempts to collect on the returned assets to minimize the resulting loss of insurance funds. *Id.* Thus, regardless whether the FDIC liquidates a failed bank or sells its assets through a purchase-and-assumption transaction, insurance funds are likely depleted.

Because of the nearly-catastrophic number of bank failures during the 1980s,[16] the insurance funds from which the FDIC draws have been in serious danger of being depleted. *Investment Co. of the Southwest*, 875 P.2d at 1094; *see also* James J. Boteler, *Protecting the American Taxpayers: Assigning the FDIC's Six-Year Statute of Limitations to Third Party Purchasers*, 24 TEX. TECH. L.R. 1169, 1169 (1993). FIRREA was enacted, in part, to address this crisis and to place the federal deposit insurance funds on sound financial footing. *See* 12 U.S.C.A. § 1811 note (West 1989) (Purpose of 1989 Amendment). One of the many ways FIRREA seeks to accomplish this goal is by extending the time in which the FDIC has to bring suit on promissory notes acquired from

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[16] More FDIC-insured banks failed in the United States in 1986 and 1987 alone than did from 1945 to 1980 combined. Peter G. Weinstock, *Directors and Officers at Failing Banks: Pitfalls and Precautions*, 106 BANKING L.J. 434 (citing The FDIC's Annual Report for the Year 1987).

failed banks.[17] A longer limitation period necessarily increases the FDIC's prospects of recovering on those notes, thereby protecting the FDIC and the public funds that it administers. An extended limitation period also enhances the FDIC's ability to market failed-bank notes, ***but only if that limitation period runs with the notes.*** Conversely, if the extended limitation period does not run with the notes, the FDIC would have to retain and pursue all notes for which the relevant state statute of limitation had already run. This is directly adverse to the policy and purpose of FIRREA and the interests of the tax-paying public.

Enhancing the FDIC's ability to market notes acquired from failed banks is by no means a novel concept. The extension of the *D'Oench Duhme* doctrine and federal holder-in-due-course status to assignees of the FDIC both arise from this policy concern. For example, in *FDIC v. Newhart*, 892 F.2d 47 (8th Cir. 1989), the Eighth Circuit noted that "[i]f holder in due course status did not run with the notes acquired by the FDIC in purchase and assumption transactions, the market for such notes would be smaller, which would have a deleterious effect on the FDIC's ability to protect

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[17] During the FIRREA hearings, Senator Riegle said regarding the extended statute of limitation, that "[t]he provisions should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law, claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods." 135 Cong. Rec. S10205 (daily ed. Aug. 4, 1989) (*quoted in The Cadle Co. v. Matheson*, 870 S.W.2d at 550).

the assets of failed banks." *Id.* at 50. The same reasoning was used by the Fifth Circuit in extending the protections of *D'Oench Duhme* to private parties who purchase failed-bank assets from the FSLIC. *Porras*, 903 F.2d at 381 (quoting *Newhart*).

Just as extending the *D'Oench Duhme* doctrine and federal holder-in-due-course status to assignees of the FDIC facilitates Congress' policy of protecting failed banks' assets, the extension of the six-year limitation period to assignees of the FDIC would further Congress' intent in enacting 12 U.S.C. § 1821(d)(14). *Bledsoe*, 989 F.2d at 811. Conversely, "[t]o hold that assignees are relegated to the state statute of limitations would serve only to shrink the private market for the assets of failed banks."[18] *Fall v. Keasler*, 1991 U.S. Dist. LEXIS 18771, at *12, *quoted in Bledsoe*, 989 F.2d at 811. "The FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC." *Id.* Recognizing these policy concerns, the Fifth Circuit, and virtually every other court that has considered the issue, including the Texas Supreme Court, has concluded that assignees of the FDIC are entitled to the extended limitation period available to the FDIC under FIRREA.[19] *See*

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[18] Moreover, there is no legal or economic sense in a rule that would permit the maker of a note, who has an enforceable legal obligation to the FDIC, to escape enforcement of that very same obligation by the FDIC's assignee. *Fall v. Keasler*, 1991 U.S. Dist. LEXIS 18771, at *12-13.

[19] The only courts outside of Texas that have held to the contrary are the United States District Court for the Eastern

Bledsoe, 989 F.2d at 811; *Jackson*, 883 S.W.2d at 172, 178.

The Fifth District Court of Appeals' holding in this case prevents Petitioner, and hundreds of other purchasers similarly situated to Petitioner, from enjoying a valuable property right conferred upon them by federal law — the right to an additional two years in which to assert a cause of action on a note acquired from the FDIC. To restrict the transfer of this right *by contract* is contrary to the language of FIRREA. Congress could not have worded the language of FIRREA in a more concise manner — "notwithstanding any provision of any contract," the six year limitation period applies. 12 U.S.C. § 1821(d)(14).

The holding in this case not only creates a decisional conflict among the states and *within* the Fifth Circuit, as stated above, it also conflicts with the specific language of FIRREA. The Fifth District Court of Appeals' determination that *as a matter of contract* the FDIC did not *sell* the FIRREA limitation period to Petitioner circumvents the holdings of the Fifth Circuit in *Bledsoe*, the Texas Supreme Court in *Jackson*, and the numerous other courts that have held that FIRREA itself entitles assignees of the FDIC to the extended FIRREA limitation period. In so doing, the Fifth District Court of Appeals has destroyed the value of not only the Weaver Notes, but of all notes acquired from the FDIC under the standard

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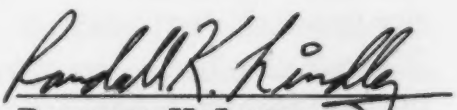
District of Virginia in *WAMCO, III, Ltd. v. First Piedmont Mortgage Corp.*, 856 F. Supp. 1076 (E.D. Va. 1994), and the First Circuit Court of Appeals in Louisiana in *NSQ Assocs. v. Beychok*, 644 So. 2d 808 (La. App. 1994).

form of contract used in this transaction and litigated in the State of Texas — home to arguably more than its share of failed-bank notes. The losses suffered by the private parties to those contracts will directly decrease their ability and willingness to participate in the market for FDIC notes at the present and after future bank failures. The result is to diminish the FDIC's ability to fulfill its statutory role as insurer of depositors' funds. Overturning the Fifth District Court of Appeals' judgment in this case will send a clear message to all purchasers of failed-bank assets that their property rights, as defined by federal law, will be protected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



RANDALL K. LINDLEY
DAVID R. GIBSON
Attorneys for Petitioner

APRIL 1995

APPENDIX A

AFFIRMED and Opinion Filed July 30, 1994.

In The

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-92-01737-CV

THE CADLE COMPANY, Appellant

V.

ESTATE OF FORREST WEAVER, Appellee

On Appeal from the 191st District Court
Dallas County, Texas
Trial Court Cause No. 91-251-J

OPINION ON REMAND

Before Justices Baker,
Chapman, and Barber
Opinion by Justice Barber

The Cadle Company seeks to recover on two promissory notes. The trial court held that appellant's claims were barred by the four-year statute of limitations.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Weaver executed two promissory notes payable to the First National Bank of Irving. The first note was in the principal sum of $52,156.64. The second note was in the principal sum of $17,841.55. Weaver defaulted on his obligation to make payment under both notes.

In April 1986, the First National Bank of Irving was placed in receivership. On November 12, 1986, the Federal Deposit Insurance Corporation (FDIC), as receiver for the First National Bank of Irving, made demand on Weaver for full payment of both notes. Weaver did not make payment under either note. The FDIC then sold the promissory notes to appellant (Cadle). Cadle filed suit against Weaver on January 8, 1991.

Weaver died on January 11, 1991. Evelyn Weaver, executrix of the estate of Forrest Weaver, filed a Suggestion of Death in this cause, substituting the estate of Forrest Weaver (Weaver) as defendant.

The parties filed cross-motions for summary judgment. The trial court granted summary judgment in favor of Weaver, finding that Cadle's claims were barred by the four-year statute of limitations.

Cadle appealed, asserting by one point of error that the trial court erred in holding that Cadle's action was barred by the four-year Texas statute of limitations, because appellant as

assignee of the FDIC is entitled to application of the six-year federal statute of limitations, codified as 12 U.S.C. 2 (sic) 1821(d)(14)(A), which extended limitation period preserved Cadle's cause of action.

Weaver argued on appeal that Cadle as assignee of the FDIC was not entitled to the statutory six-year statute of limitations and because paragraph 2.12 of the Loan Sale Agreement (the document by which Cadle purchased the Weaver notes from the FDIC) specifically provided that Cadle would not in any event raise or pursue any special legal argument or position available to the FDIC as a result of its activities as liquidator or receiver of failed banks whether such argument or position is based on statute such as 12 U.S.C. Section 1823(a), or case law, such as *D'Oench Duhme & Co. v. FDIC*, 31 U.S. 447 (1942) and its related line of cases.

By cross-point Weaver argued that Cadle's cause of action should have been abated by the trial court because Cadle was transacting business in the State of Texas without a certificate of authority.

On original submission, relying on a prior decision of this court, we affirmed the trial court's judgment. We held that the Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C.A. § 1821(d)(14) (West 1989) (FIRREA) did not extend the limitations period to assignees of the FDIC, such as Cadle. We did not reach appellee's other contentions.

The Texas Supreme Court reversed the case on which we based our earlier opinion and judgment in this case. *See Federal Debt Management, Inc. v. Weatherly*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994) (reversing the case upon which we relied); *The Cadle Company v. Estate of Forrest Weaver*, 37 Tex. Sup. Ct. J. 588 (March 9, 1994) (reversing our earlier opinion in this case); *see also Jackson v. Thweatt*, 37 Tex. Sup. Ct. J. 555, 560 (March 9, 1994). The supreme court held that generally the assignee of a promissory note from the FDIC is entitled to the benefit of the limitations period accorded the FDIC under FIRREA.

The supreme court remanded the case to us to consider Weaver's other arguments, to wit: that Cadle, under its contract with FDIC, was not entitled to assert the six year limitations period and that the trial court erred by not granting Weaver's plea in abatement challenging Cadle's corporate standing to bring suit in Texas. Having considered the remaining issues, we affirm the trial court's judgment.

APPELLEE'S CROSS-POINT

Weaver, by cross-point, asserted that the district court erred in not granting its plea in abatement. The plea in abatement plead that Cadle was not authorized to do business in Texas and therefore prayed the court to dismiss Cadle's lawsuit.

Rule 52(a) of the Texas Rules of Appellate Procedure provides in relevant part that in "order to preserve a complaint for appellate review . . . It is necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." TEX. R. APP. P. 52(a). This rule has been applied to pleas in abatement. *See Forest Cove Properties Owners Assoc. Inc. v. Lightbody*, 731 S.W.2d 170, 171 (Tex. App.--Houston 1987, no writ).

While the record before us contains appellee's plea in abatement, there is nothing in the record before us indicating that the trial court ever ruled on the motion. Thus, nothing is presented for review regarding the plea in abatement. We overrule appellee's cross-point of error.

THE LIMITED ASSIGNMENT

Cadle bases its argument for application of the six-year statute of limitations on 12 U.S.C. § 1821(d)(14) that provides as follows:

> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the corporation as conservator or receiver shall be --
>
> (i) in the case of any contract claim, the longer of --

(I) the six-year period beginning on the date the claim accrues; or

(II) the period applicable under state law . . . ." (sic)

Absent application of the federal statute Cadle's claims are barred by the Texas four-year statute of limitations as set forth in Texas Civil Practice and Remedies Code § 16.004(a)(3) (sic).

Weaver asserted in its summary judgment pleadings and brief that the FDIC did not transfer FDIC rights and defenses to Cadle. Paragraph 2.12 of the FDIC's assignment to the Cadle contained the following limitation:

> FDIC Defenses. Buyer acknowledges that it does not have the right to, and further warrants, represents and agrees that it will not in any event raise or pursue any special legal argument or position available to the FDIC as a result of its activities as liquidator or receiver of failed banks, whether such argument or position is based on statute such as 12 U.S.C. Section 1823(e), or case law, such as *D'Oench Duhme and Co. v. FDIC*, 31 U.S. 447 (1942) and its related line of cases. Buyer acknowledges that there is no adequate remedy at law for violation of this provision and consents to the entry of an order by a

> court of competent jurisdiction enjoining any violation or threatened violation of this provision.

Weaver contends that by virtue of this language, the FDIC expressly limited the rights and benefits Cadle purchased.

Cadle argues that the trial court's judgment cannot be affirmed on the basis of the limited assignment because the trial court's summary judgment failed to state that Weaver's limited assignment defense was a ground for summary judgment. Generally, where the summary judgment order specifies the grounds upon which it is granted, appellate courts must limit their review to those grounds. *See Delaney v. University of Houston*, 835 S.W.2d 56, 58 (Tex. 1992).

The trial court's summary judgment order held:

> 1. The Cadle Company's claim against the Estate of Forrest Weaver is barred by the Texas Statute of Limitations as codified as Texas Civil Practices and Remedies Code § 16.001 *et. seq.*
>
> 2. The Cadle Company is not entitled to application of the six (6) year Federal Statute of Limitations codified as 12 U.S.C. § 1821(d)(14)(A).

One of the grounds asserted for summary judgment by Weaver was that the federal statute of limitations did not apply because the FDIC and

Cadle agreed, by virtue of the limited assignment, that the statutory benefits accruing to the FDIC were withheld from Cadle. We hold the trial court's summary judgment order, as set forth above, sufficiently encompassed such defense.

Cadle also argues that Weaver was neither a party to the Loan Sale Agreement between Cadle and the FDIC, nor an intended third-party beneficiary under the agreement. Cadle contends that since Weaver is a stranger to the Loan Sale Agreement, it has no standing to benefit from the terms of the agreement.

Weaver replies that it never claimed to be a third-party beneficiary. Weaver contends that by virtue of paragraph 2.12 of the Loan Sale Agreement, Cadle gave up the right to assert the extended statute of limitation conferred by the statute. We agree with Weaver.

The critical issue is the extent and nature of the rights Cadle purchased from the FDIC. Cadle cannot assert rights greater than it possesses.

Generally, an assignment carries with it all rights, remedies, and benefits that are incidental to the thing assigned. 6A C.J.S. Assignments § 76 (1975); *see also Jackson v. Thweatt*, 37 S. Ct. J. 555, 557 (Tex. Mar. 9, 1994). However, "[t]he operation and effect of an assignment may be limited by exceptions, reservations, conditions, or restrictions contained therein." *Id.* § 78; *see also* TEX. BUS. & COM. CODE ANN. § 3.202(c) and (d) (Tex. UCC) (Vernon 1968); TEX. BUS. & COM. CODE ANN. §

3.302(d) (Tex. UCC) (Vernon 1968) ("A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased."). However, for whatever reason, the FDIC did not sell and Cadle did not purchase all of the FDIC's rights. Specifically, Cadle did not purchase right to the six year statute of limitations under 12 U.S.C. § 1821(d)(14)(A). Cadle points out in its brief that the FDIC has changed its practice of such a limited assignment. We, however, must look at the specific transaction.

In the assignment under which it sues, Cadle "warrants . . . that it will not in any event raise or pursue any special legal argument or position available to the FDIC as a result of its activities as liquidator or receiver of failed banks . . . ." We hold that by execution of the Loan Sale Agreement the FDIC did not convey and Cadle did not purchase the rights under the federal statute and the case law it now seeks to assert. We overrule Cadle's point of error.

We affirm the trial court's judgment.

s/_____
WILL BARBER
JUSTICE

Do Not Publish
TEX. R. APP. P. 90
921737RF.U05

APPENDIX B

Order issued August 15, 1994

In The
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-92-01737-CV

THE CADLE COMPANY, Appellant

V.

ESTATE OF FORREST WEAVER, Appellee

ORDER

Before Justices Baker,
Chapman, and Barber

Appellant's motion for rehearing is OVERRULED.

s/_____
WILL BARBER
JUSTICE

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 8, 1994

Mr. Randall K. Lindley
Caolo & Bell
3232 McKinney
Suite 1400
1400 One McKinney Plaza
Dallas, TX 75204-2429

Mr. Michael L. Jones
Henry Meier Jones & Travis
3710 Thanksgiving Tower
Dallas, TX 75201

Ms. P. Anne Brewster
Caolo & Bell
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, TX 75204-2429

Mr. Robert W. Fischer
Fischer & Sanger
5956 Sherry Lane
Suite 1204
Dallas, TX 75225

RE: Case Number: 94-0946
Style: THE CADLE COMPANY
v.
ESTATE OF FORREST WEAVER

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by s/_____
Gene Burns, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 12, 1995

Mr. Randall K. Lindley
Caolo & Bell
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, TX 75204-2429

Mr. Michael L. Jones
Henry, Meier Jones
& Travis
3710 Thanksgiving
Tower
1601 Elm Street
Dallas, TX 75201

Ms. P. Anne Brewster
Caolo & Bell
1400 One McKinney
Plaza
3232 McKinney Avenue
Dallas, TX 75204-2429

Mr. Robert W. Fischer
Fischer & Sanger
5956 Sherry Lane,
Ste. 1204
Dallas, TX 75225

RE: Case Number: 94-0946
Style: THE CADLE COMPANY
v.
ESTATE OF FORREST WEAVER

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the

application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

By s/_____
Michael C. Murphey,
Deputy Clerk

APPENDIX E

Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

12 U.S.C. § 1821(d)(14).

APPENDIX F

Four-Year Limitations Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

(1) specific performance of a contract for the conveyance of real property;

(2) penalty or damages on the penal clause of a bond to convey real property; or

(3) debt.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

Tex. Civ. Prac. & Rem. Code § 16.004 (Vernon 1986).

APPENDIX G

BILL OF SALE

The Federal Deposit Insurance Corporation, in its corporate or receiver capacity, as applicable, for value received and pursuant to the terms and conditions of a Loan Sale Agreement (the "Agreement") between the FDIC and The Cadle Company ("Buyer"), dated February 28, 1990, does hereby sell, assign and convey to Buyer, its successors and assigns, all right, title and interest of Seller in and to those certain promissory notes and other obligations evidenced by borrower's name, original amount, principal balance and other data on the Spreadsheet identified as Attachment 2 to the Agreement, which Spreadsheet is attached hereto, incorporated herein and made a part hereof for all purposes. ...

APPENDIX H

IN THE SUPREME COURT OF TEXAS

NO. D-3866

THE CADLE COMPANY, PETITIONER

v.

ESTATE OF FORREST WEAVER, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO
THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS

Per Curiam

This case presents the question resolved today in *Jackson v. Thweatt*, ___ S.W.2d ___ (Tex. 1994). Because the decision of the court of appeals, ___ S.W.2d ___, conflicts with our holding in *Jackson*, we reverse the judgment of the court below and remand the cause to that court for further proceedings.

Forrest Weaver executed two promissory notes to the First National Bank of Irving in February 1984 and February 1986, respectively. The FDIC, as receiver for the bank, acquired these notes in April 1986. The notes went into default in November 1986, and were subsequently assigned by the FDIC to The Cadle Company ("Cadle") in February 1990. After Cadle brought suit against Weaver on the notes in January 1991, the defendant[1] moved for summary judgment based on the Texas four year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.004. The trial court granted defendant's motion for summary judgment, and the court of appeals affirmed, rejecting Cadle's argument that it was entitled to the six year limitations period applicable to the FDIC. *See* 12 U.S.C. § 1821(d)(14).

We held today in *Jackson* that an assignee of a promissory note from the FDIC does receive the benefit of the extended limitations provision applicable to the FDIC. Accordingly, without hearing oral argument, a majority of the Court reverses the judgment of the court of appeals and remands the cause to that court for consideration of respondent's remaining arguments not previously reached.[2]

---

[1] Weaver died a short time after suit was filed and the executor of his estate was substituted as defendant.

[2] Respondent argues that, even if an assignee generally receives the benefit of the FDIC's special limitations period, Cadle expressly waived that right in this case pursuant to a contractual provision in the assignment. Respondent also contends that the trial court erred by not granting its plea in abatement challenging Cadle's corporate standing to bring suit in Texas.

OPINION DELIVERED: March 9, 1994

APPENDIX I

IN THE SUPREME COURT OF TEXAS

NO. D-3866

THE CADLE COMPANY, PETITIONER

v.

ESTATE OF FORREST WEAVER, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO
THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fifth District, and having considered the appellate record and briefs of counsel, but without hearing oral argument, pursuant to Rule 170, Texas Rules of Appellate Procedure, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) The cause is remanded to the Court of Appeals for the Fifth District for further proceedings in conformity with the opinion of this Court;

3) The Cadle Company shall recover from the Estate of Forrest Weaver, which shall pay, the costs incurred in this Court in this cause.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fifth District. The original record and all instruments filed with the court of appeals shall accompany the mandate of this Court to the Fifth Court of Appeals.

(Opinion of the Court delivered Per Curiam)

March 9, 1994

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APPENDIX J

FALL V. KEASLER

NO. C 90 20643 SW (ARB)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

1991 U.S. Dist. LEXIS 18771

December 18, 1991, Decided

December 18, 1991, Filed; December 26, 1991, Entered

Defendant Thomas W. Keasler's ("Keasler") Motion to Dismiss the Complaint for lack of diversity jurisdiction and Plaintiff Charles P. Fall's ("Fall") Motion for Summary Judgment were set for hearing on November 20, 1991. Counsel for Fall appeared and counsel for Keasler did not appear for hearing. The Court decided the motions on the papers submitted.

Undisputed Facts

The following facts are undisputed. This is an action to recover amounts of principal, interest and costs due pursuant to the terms of a Commercial Note Multiple Advance Line of Credit (the "Note"). Keasler, a California resident, executed and gave the Note in the amount of $50,000 to the Bank of Los Gatos, N.A. (the "Bank") on August 24, 1984. The Note provides for regular

interest, a default rate of interest and attorney's fees and costs expended in collection of amounts due [*2] under the Note as set forth in the Complaint.

Keasler defaulted on the Note on September 4, 1985. On July 27, 1987, the Bank became insolvent and the Federal Deposit Insurance Corporation (the "FDIC") took over as receiver and took over the Note. On October 23, 1990, the FDIC sold the Note and assigned it directly to Fall, a resident of Oregon, as trustee for six beneficiaries who are all California residents. Fall filed this suit on November 13, 1990.

By stipulation filed with this Court, Keasler conceded that the amounts claimed due in the Complaint were owing and asserted as defenses only a lack of jurisdiction and the time bar of the statute of limitations. It is these two defenses which are at issue on these motions. Having considered the arguments of the parties, the Court rules as follows.

Motion to Dismiss

Keasler moved to dismiss the Complaint pursuant to 28 U.S.C. § 1359 on the grounds that diversity jurisdiction was collusively made by appointment of an Oregon trustee. Keasler argues that an assignment without consideration to a corporate director is presumptively a collusive assignment to manufacture jurisdiction. The issue here, however, is not one of assignment, [*3] with or without consideration; it is whether this Court

may look behind the valid appointment of a trustee to determine the trustee's right to bring suit on behalf of the trust.

It is well-settled federal law that a trustee who holds legal title to trust assets has authority to sue to protect those assets. It is the citizenship of the trustee and not the beneficiaries of the trust that controls in determining diversity; the residence of the beneficiaries is irrelevant. *See e.g. Chappedelaine v. Dechenaux*, 8 U.S. 306, 307 (1808); *Childress v. Emory*, 21 U.S. 642, 645 (1823); *Osborne v. Bank of United States*, 22 U.S. 738, 816 (1824); *Bonnafee & Co. v. Williams*, 4 U.S. 574, 575 (1845) (note held in trust for third party); *Susquehanna & Wyoming Valley Railroad & Coal Co. v. Blatchford*, 78 U.S. 172, 180 (1870); *Bullard v. Cisco*, 290 U.S. 177, 180 (1933) (trust beneficiaries not necessary parties and their citizenship is immaterial).

As recently as 1980, the Supreme Court affirmed that a trustee who holds legal title to an asset is the real party in interest and is privileged [*4] to sue upon that asset in diversity without regard to the citizenship of the trust beneficiaries. In *Navarro Savings Association v. Lee*, 446 U.S. 458, 464-465 (1980), the Court held that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses the customary powers to hold, manage and dispose of assets for the benefit of others.

In reaching this decision, affirming more than 150 years of case law, the Court emphasized the need for a simple standard: " 'Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources.' " *Id.* at n.13 (quoting Currie, The Federal Courts and The American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968)).

The Plaintiff meets the standard set out in Navarro Savings. Fall holds legal title to the Note: the FDIC assigned all of its right, title and interest in the Note directly and solely to Fall as trustee. Pursuant to the terms of the trust, Fall has the authority to collect the proceeds of and to sue upon the Note as trustee. He holds all the "customary" powers of a trustee [*5] to manage and control the asset which is the subject of this litigation. These powers are established in the Fall Declaration and are uncontroverted by any other evidence in this case. This evidence, combined with the endorsement of the FDIC on the Note to "Charles P. Fall, Trustee" is sufficient to find in favor of Fall on the motion to dismiss.[1]

---

[1] Moreover, under California's law of trusts, a trustee of an express oral trust has the authority to sue without naming the beneficiaries. A trustee with legal title to trust property is the real party in interest and need not join the beneficiaries to maintain suit. 4 Witkin, California Procedure, Pleading @ 117; *Powers v. Ashton*, 45 Cal. App. 3d 783, 787 (1975). *See* Cal. Prob. Code § 16249; 11 Witkin, Summary of California Law 9th, Trusts @ 128.

Keaslers challenge to jurisdiction would engage the Court in legally irrelevant inquiries into the "intent" of the trust. This type of inquiry is precisely what the Navarro Savings decision and 150 [*6] years of precedent have sought to eliminate.

The single case relied upon by Keasler in his motion to dismiss is not to the contrary; it does not address the circumstances of this case. In *Dweck v. Japan CBM Corp.*, 877 F.2d 790, 792 (9th Cir. 1989), the Court of Appeal discussed the contention that there had been a collusive assignment without consideration from a corporation to its director to create diversity jurisdiction. Here, there has been no assignment from the trust beneficiaries to Fall.[2] The trust beneficiaries never held title to the Note: the endorsement on the Note shows incontrovertibly that it was assigned directly from the FDIC to Fall as trustee.

While the Ninth Circuit [*7] has determined that certain corporate assignments are presumptively collusive, no court of this circuit has ever looked beyond the citizenship of a duly appointed trustee, to the citizenship of the beneficiaries of a trust, to determine diversity

---

[2] The Ninth Circuit has ruled that where there is no assignment, and the claims litigated belong to the plaintiff, there is no merit to a claim for collusive assignment under 28 U.S.C. § 1359. *See North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1450 (9th Cir. 1986).

jurisdiction. Navarro Savings makes clear that any such inquiry is both legally irrelevant and a waste of judicial resources.

The motion to dismiss for lack of subject matter jurisdiction is DENIED.

Motion For Summary Judgment

The statute of limitations applicable to an action brought by an assignee of the FDIC is apparently one of first impression in this circuit. Keasler argues that Fall does not benefit from the six year limitations period that would apply if the FDIC had sued on this Note, but instead, that this action is governed by the four year statute provided by California law. The Court finds this argument is without merit.

Fall timely commenced this action within the relevant six year statute of limitations. Pursuant to the Federal (sic) Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(14)(A) & (B), the statute of limitations on any action brought on a contract is the longer [*8] of six years beginning at accrual of the claim or the period applicable under state law. This statute of limitations begins to run on the later of the date of appointment of the FDIC as conservator or receiver, or the date on which the cause of action accrues.[3] *FDIC v. Howse*, 736 F.

---

[3] The FDIC took its assignment of the Note in its corporate capacity. Even in this capacity, the statute of limitations set forth in 12 U.S.C. § 1821(d)(14)(A) applies. *See* 12 U.S.C. § 1823(d)(3)(A) (making § 1821 applicable to the

Supp. 1437, 1444 (S.D. Texas 1990). The Note became due on September 3, 1985 and was in default the following day, September 4, 1985. On July 23, 1987, the FDIC took an assignment of the Note from the failed Bank of Los Gatos. On October 23, 1990, Fall took an assignment of the Note from the FDIC; Fall filed this action on November 13, 1990.

Under any calculation made under the FIRREA statute of limitations, [*9] this action was timely brought. Measuring from the accrual date of September 4, 1985, the six year statute applies and commencement of this action on November 13, 1990 was timely. If the accrual date is July 23, 1987, the date on which the FDIC was appointed receiver, application of either the four year state statute of limitations -- expiring on July 23, 1991 -- or the six year federal statute -- expiring on July 23, 1993 -- would lead to the conclusion that this action was timely filed.

As assignee of the FDIC, Fall partakes of the six-year FIRREA statute of limitations. In *Mountain States Financial Resources Corporation v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991) the District Court held that the "general principle [that the assignee stands in the shoes of the assignor] and a strong public policy requires that the FDIC's assignee acquire the six year limitations

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FDIC in its corporate capacity all rights accorded in its capacity as receiver).

period provided by § 1821(d)(14)(A)." This Court agrees with and adopts the reasoning of the court in *Mountain States*.

Under well-established California law, the assignee stands in the shoes of his assignor. California Commercial code § 3201 provides in relevant part:

(1) Transfer of [*10] an instrument vests in the tranferee such rights as the transferor has therein . . . .

See also Northern California Monument Dealers Ass'n v. Interment Ass'n of California, 120 F. Supp. 93, 94 (S.D. Cal. 1954). While Fall acquired rights no better than those of his assignor, he also acquired rights no worse. *See Carpenter v. Trujillo*, 79 Cal. Rptr. 725, 727 (Sup. Ct. 1969). When Fall took the assignment of the Note he also took the benefit of the statute of limitations afforded the FDIC.

Application of FIRREA's six-year limitations period is also compelled by the policy favoring sale of assets by the FDIC to private parties. When the Bank failed and the FDIC took an assignment of the Note on July 23, 1987, FIRREA provided a statute of limitations that made any action brought through July 23, 1993 timely. Thus, the FDIC could have chosen to keep the Note and waited six years to bring an action against Keasler to enforce it. Instead, one month after taking it, the FDIC chose to sell and assign the Note to Fall, who promptly filed this action. Keasler did not win the

right to repose under a shorter limitations period when the FDIC elected to [*11] sell the Note and assign it to Fall.

In analogous situations, federal courts have accorded assignees of the FDIC the right to step into the shoes of the FDIC and obtain its rights under FIRREA. For example, courts have unanimously held that assignees partake of the FDIC's statutory "super" holder-in-due-course status pursuant to statute and the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). *Campbell Leasing, Inc. v. FDIC*. 901 F.2d 1244, 1249 (5th Cir. 1990); *Bell & Murphy & Associates v. Interfirst Bank Gateway*, 894 F.2d 750, 754 (5th Cir.) (bridge bank as assignee), *cert. den.*, 111 S. Ct. 244 (1990); *In re Hood*, 95 Bankr. 696, 700-01 (W.D. Mo. Bankr. 1989); *FDIC v. Newhart*, 713 F. Supp. 320, 324 (W.D. Mo.), *aff'd*, 892 F.2d 47 (8th Cir. 1989); *RSR Properties, Inc. v. FDIC*, 706 F. Supp 524, 531 (W.D. Texas 1989). In *Newhart*, the Eighth Circuit explained the policy rationale for this rule as follows:

In certain cases, such as the instant one, the FDIC may decide to sell returned assets after bringing suit [*12] for collection. Because these assets are unusually nonperforming loans, there would be little or no incentive for prospective purchasers to acquire them if they were subject to the personal defenses of the obligors based on undisclosed agreements. If this avenue of cutting losses became unavailable to the FDIC, purchase and assumption transactions would become more expensive and thus, less likely to occur.

892 F. 2d at 50.

The same policy compels giving the FDIC's assignees the benefit of the FIRREA statute of limitations. To hold that assignees are relegated to the state statute of limitations would serve only to shrink the private market for the assets of failed banks. It would require the FDIC to hold onto and prosecute all notes for which the state statute of limitations has expired because such obligations would be worthless to anyone else. This runs contrary to the policy of allowing the FDIC to rid the federal system of failed bank assets. The FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC.

Moreover, there is no [*13] legal or economic sense in a rule that would permit the maker of a note who has an enforceable legal obligation to the FDIC to escape enforcement of the very same obligation by the FDIC's assignee.

Having resolved all remaining issues in dispute in favor of the plaintiff, Falls motion for summary judgment is GRANTED.

IT IS ORDERED THAT judgment shall be entered against defendant Keasler as follows:

$49,968.00 in principal due;

$36,788.46 in interest due;

$20.19 per day in interest due from November 11, 1990 through the date of entry of judgment;

$21,465.00 in attorneys' fees through September 30, 1991; and

such further attorneys' fees and costs as plaintiff shall submit and the Court approves; the Court retains jurisdiction for the limited purpose of reviewing and approving attorneys' fees and costs incurred after September 30, 1991, so long as they concern either of these motions, entry of this Order or entry of judgment in these proceedings, or obtaining satisfaction of such judgment entered.

IT IS SO ORDERED.

Dated: December 18, 1991

Spencer Williams
United States District Judge